2004-2005 BTG FEDERAL UPDATE
Cases since Outline Submitted

I. CIVIL LITIGATION AND PROCEDURE

A. Jurisdiction

1. Exxon Mobile Corp. v. Saudi Basic Indus. Corp., __ U.S. ___, 125 S. Ct. 1517 (2005). Rooker-Feldman applies only to those cases which seek federal review of state court judgments entered before the federal suit is commenced. In the instance of parallel state and federal proceedings, Rooker-Feldman is not triggered by entry of a judgment in the state proceedings.

2. Public Water Supply District No. 8 v. City of Kearney, 401 F.3d 930 (8th Cir. 2005). Dispute concerning which entity should provide water service to property owners was not ripe for adjudication at the time of review because the property was not detached from the District; detachment proceedings were still pending in state court.

3. Longie v. Spirit Lake Tribe, 400 F.3d 586 (8th Cir. 2005). Court did not have subject matter jurisdiction over quiet title action between Indian tribe and tribal members concerning land within the reservation.

4. Hardin v. BASF Corp., 397 F.3d 1082 (8th Cir. 2005). Plaintiffs' state law claims for negligence and strict liability (based on damage to tomato plants harmed by a herbicide) were preempted by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). But see Bates v. DowAgrosciences, ___ U.S. ___, ___ S. Ct. ___, 2005 WL 957193 (4/27/2005), where U.S. Sup. Ct. held FIFRA only applies to state law labeling or packaging requirements.

5. Whittley v. BNSF, 395 F.3d 829 (8th Cir. 2005). Decision by trial court to remand a case to state court based on lack of subject matter jurisdiction is not subject to appellate review.

6. iNET v. Developershed, Inc., 394 F.3d 1081 (8th Cir. 2005). Unambiguous forum selection clause in contract prevented defendant from removing case from state court to federal court.

B. Procedure

1. Dura Pharmaceuticals v. Broudo, ___ U.S. ___, 125 S. Ct. _____, 2005 WL 885109 (4/19/2005). Plaintiffs to a securities fraud class action failed to plead an allegation of "loss causation" sufficiently under Fed. R. Civ. P. 8(a)(2): "short and plain statement" was not satisfied by allegation that the loss consisted of "artificially inflated purchase prices," which is not a relevant economic loss.

2. Ballard v. Commissioner of IRS, ___ U.S. ___, 125 S. Ct. 1270 (2005). Fact-finding reports by special trial judges could not be excluded from the appeal record by the Tax Court.

3. Jones v. Correctional Medical Services, 401 F.3d 950 (8th Cir. 2005). Where there were other beneficiaries/creditors of the estate of plaintiff/administrator's decedent, non-lawyer administrator could not bring a wrongful death action under either Arkansas law or federal law.

4. Blades v. Monsanto, 400 F.3d 562 (8th Cir. 2005). In antitrust class action alleging price-fixing two classes of farmers who purchased corn and soybeans sought certification as separate classes of plaintiffs -- plaintiffs did not show common evidence which would show classwide injury.

5. Dossett v. First State Bank, 399 F.3d 940 (8th Cir. 2005). In plaintiff's lawsuit claiming defendants conspired to terminate her employment after she made comments at a public meeting concerning tax issues, trial court did not abuse its discretion in finding that a jury verdict of $1.5 million for pain and suffering was excessive and the product of passion and prejudice; the award of non-economic damages was nearly 28 times the lost wages. Also, trial court did not abuse discretion in denying remittitur and ordering new trial on damages and liability where it was likely that the liability finding was also tainted by passion and prejudice.

6. Shanklin v. Fitzgerald, 397 F.3d 596 (8th Cir. 2005). Trial court properly struck unauthenticated exhibits submitted in resistance to a motion for summary judgment on the basis such documents did not meet the requirements of Fed. R. Civ. P. 56(e), which in turn led to granting defendants' motion for summary judgment.

C. Evidence

1. Villa v. BNSF, 397 F.3d 1041 (8th Cir. 2005). An internal personal injury form which was not filed by the railroad carrier was properly allowed into evidence, particularly when regulations provide the form must be made available to the injured employee when requested.

II. CRIMINAL LAW

A. Criminal Acts

1. Pasquantino v. United States, ___ U.S. ___, 125 S. Ct. _____, 2005 WL 946716 (4/26/2005). The federal wire fraud statute was violated by a scheme to defraud a foreign government of tax revenue from importation of liquor.

2. Small v. United States, ___ U.S. ___, 125 S. Ct. _, 2005 WL 946620 (4/26/2005). In the felon in possession statute, "convicted in any court" does not include convictions in foreign courts, here Japan (here, ironically, for attempting to smuggle firearms and ammunition into that country).

3. United States v. Painter, 400 F.3d 1111 (8th Cir. 2005). A charge of generic burglary counts as a violent felony under the Armed Career Criminal Act (ACCA) unless the plea colloquy or agreement establish a factual predicate that defendant pled guilty to an offense that was not generic burglary.

4. United States v. Sdoulam, 398 F.3d 981 (8th Cir. 2005). A charge of conspiracy to violate 21 U.S.C. § 841(c)(2), which sanctions knowing or intentional possession of a listed chemical "having reasonable cause to believe" it will be used to manufacture a controlled substance, does not impose a negligence standard on conduct.

5. United States v. Nolan, 397 F.3d 665 (8th Cir. 2005). Defendant's two prior convictions for second-degree burglary and two prior escape convictions qualified as "violent felonies" under the ACCA. Literally as a footnote, the Circuit noted that the fact of prior conviction is a legal determination and not a jury issue, therefore, Blakely would not require resentencing.

6. United States v. McCall, 397 F.3d 1028 (8th Cir. 2005). A felony conviction for DWI is not considered a violent felony under the ACCA.

7. United States v. Barbour, 395 F.3d 826 (8th Cir. 2005). Vehicle theft is a "violent felony" under the ACCA.

8. United States v. Blake, 394 F.3d 1089 (8th Cir. 2005). Defendant's "straw purchases" of eleven handguns and six rifles from five separate dealers over a three-day period was a clear violation of the statute prohibiting making false statements to a licensed dealer about purchase for personal use or as a gift, particularly where the ATF form cited as an example of forbidden conduct exactly what defendant was doing.

B. Procedure

1. Smith v. Massachusetts, ___ U.S. ___, 125 S. Ct. 1129 (2005). Submission of a firearm count to the jury after a mid-trial motion for acquittal on the firearm charge had been granted violated the Double Jeopardy Clause, particularly where Massachusetts did not have a procedure for reconsideration of mid-trial determinations.

2. United States v. Gonzalez-Lopez, 399 F.3d 924 (8th Cir. 2005). District court's denial of application for admission pro hac vice from out-of-state counsel was not harmless error and was based an on incorrect interpretation of Missouri rules of professional conduct, requiring reversal of defendant's conviction and remand for new trial.

3. United States v. Little Dog, 398 F.3d 1032 (8th Cir. 2005). District court's failure to immediately swear in the jury before the first witness testified was harmless error which did not require mistrial. Severance of obstruction of justice charge from sexual abuse charges was not erroneous where the charges were interconnected; the fact that defendant wanted to testify regarding the obstruction charge but not the sexual abuse charge was not sufficient to require severance. Finally, where there was no controversy about the medical results, refusal of defendant's request for a separate gynecological exam of the victim was not an abuse of discretion.

4. United States v. Lussier, 397 F.3d 1125 (8th Cir. 2005). Prospective juror's remarks that he knew one of defendant's witnesses as a "neighborhood nuisance" was not cause for mistrial where prospective juror was stricken and a curative instruction given.

5. United States v. Patten, 397 F.3d 1100 (8th Cir. 2005). Although prosecutor misstated Minnesota law regarding age of consent during his closing statements, district court gave prompt curative instruction concerning correct law; therefore, new trial was not warranted. Trial court's rejection of jury instruction which would not have allowed the jury to consider defendant's act of driving to an arranged meeting place as a "substantial step" in furtherance of the crime of enticement of a minor was supported by case law.

6. United States v. Gardner, 396 F.3d 987 (8th Cir. 2005). Where part of the evidence in a drug case was a bag of methamphetamine with defendant's name written on it, prosecutor's rebuttal argument ". . . Mr. Wyatt said that there was no dope that was directly linked to [defendant]. Well, sure there is. It's right here: Linda" and pointing to the bag was not a improper comment on defendant's failure to testify.

7. United States v. Luker, 395 F.3d 830 (8th Cir. 2005). Although declining to rule specifically on the availability of a justification defense to a charge of felon in possession, the Circuit found defendant could not have satisfied the elements of the defense in any event.

8. United States v. McKinney, 395 F.3d 837 (8th Cir. 2005). Because the government's failure to bring defendant to trial within 180 days under the Interstate Agreement on Detainers Act (IADA) was based on clerical filing error of defendant's IADA request, taken with the seriousness of the offenses charged (two counts of felon in possession, for each of which the maximum penalty is ten years imprisonment), and the minimal impact of re-prosecution, a dismissal of the original indictment without prejudice was not an abuse of discretion.

C. Search and Seizure

1. United States v. Adams, 401 F.3d 886 (8th Cir. 2005). Defendant failed to make a timely Rule 41(f) objection (in fact failed to even cite the rule) to the offer of certain evidence seized during a search of his bedroom on the basis the items were not listed by the seizing officers on the inventory return.

2. United States v. Hanlon, 401 F.3d 926 (8th Cir. 2005). Expansion of investigation beyond original traffic stop for failing to use a turn signal was based on driver's explanation of ownership which was inconsistent with the registration status, nervousness and "profuse" sweating, and representation that driver rolled his own cigarettes (in response to query about presence of rolling papers in plain view on the dashboard) when he was holding a pack of Camels in his hand. Pat-down search for officer's protection was justified; seizure of vial of methamphetamine from defendant's pocket did not exceed the scope of the pat-down search.

3. United States v. Bach, 400 F.3d 622 (8th Cir. 2005). Even without IP records from defendant's internet service provider (ISP), there was sufficient information in an affidavit for a search warrant of defendant's residence and computer to support a probable cause finding: there was independent evidence that defendant had chatted with a minor over the internet and met him in person; the user profile from one ISP account tracked with subscriber information from another ISP account which contained defendant's name, address and telephone number, and defendant had a prior conviction for criminal sexual conduct with a minor.

4. United States v. Terry, 400 F.3d 575 (8th Cir. 2005). Tribal law officers could detain a non-Indian causing a disturbance on tribal land: they received a call concerning a disturbance and a man in a yellow pickup, in which they found defendant with alcohol on his breath; during the encounter one officer observed a box of ammunition in plain view on the dashboard of the truck, another officer knew a protection order was in effect, and a further search of the vehicle was justified under the automobile exception by the discovery of the ammunition in plain view and imputed knowledge of the protective order.

5. United States v. Leveringston, 397 F.3d 1112 (8th Cir. 2005). Officers had probable cause to knock and announce their presence at a hotel suite when they had been called by the hotel manager and informed of suspicious activity: frequent visitors who stayed only a few minutes. From the occupant's response to the knock, followed by loud noises of items being destroyed and defendant's flight from the suite, warrantless entry after police captured defendant (a period of twenty minutes) was still justified because water continued to run and a garbage disposal to grind, both of which could destroy evidence. Additionally, the presence of blood on defendant's hand and shirt provided another reason to return to scene without warrant to ascertain no other person had been left in an injured state.

6. United States v. Fellers, 397 F.3d 1090 (8th Cir. 2005). Although defendant's statements made at home were obtained in violation of the Sixth Amendment, his subsequent statements at the jail after he had received and waived Miranda rights were not tainted by the prior violation, particularly since the prior statements were not used to prompt defendant into the jailhouse statements, which also went beyond the scope of the initial uncounseled statements.

7. United States v. Almendares, 397 F.3d 653 (8th Cir. 2005). It was not unreasonable for an officer to rely on an interpreter's telephonic translation concerning a request for a non-English-speaking suspect's consent to provide DNA swab sample nor for the officer to rely on the interpreter's belief that the suspect had given his consent.

8. United States v. Gleich, 397 F.3d 608 (8th Cir. 2005). A warrant authorizing search and seizure of anything in the suspect's home which could contain "photographs, pictures, visual representations or videos in any form that include sexual conduct by a minor" covered the seizure of three computers and computer diskettes, even though the search warrant discussed only one computer.

9. United States v. Brave Heart, 397 F.3d 1035 (8th Cir. 2005). The fact that defendant was interviewed in an interior room in the police station and that officers lied to him three times and used coercive psychological tactics did not overcome the effect of the initial statement by the investigating officer, agreed to by defendant, that defendant's presence was voluntary, rendering defendant's confession non-custodial.

10. United States v. Lopez-Rodriguez, 396 F.3d 956 (8th Cir. 2005). In response to question at suppression hearing whether defendant gave officers permission to enter apartment, defendant gave a vague response and did not specifically refute officers' testimony that she invited them in nor testify they were asked to leave, thus the district court did not clearly err in concluding officers reasonably believed they had permission to enter.

11. United States v. Lloyd, 396 F.3d 948 (8th Cir. 2005). Officers who had a lawful arrest warrant for a misdemeanor charge were entitled to enter defendant's automobile repair shop/residence even though there was no answer to a knock because they heard a fan and other noises from inside from which they could reasonably believe defendant was present (although the source of the noises turned out to be a dog overcome by fumes from a methamphetamine lab found inside the premises).

12. United States v. Bustos-Torres, 396 F.3d 935 (8th Cir. 2005). A proper Terry stop of defendants' vehicle was made after officer on surveillance for an unrelated case in a location known for drug trafficking activity observed first one car make what appeared to be a drug transaction with an individual, then within minutes the same individual entered defendants' car briefly; likewise officers were justified in conducting a pat-down search of defendants. The discovery of two wads of cash in one defendant's pockets provided probable cause to believe a drug trade had taken place.

D. Due Process/Evidence

1. United States v. Bordeaux, 400 F.3d 548 (8th Cir. 2005). Presentation of testimony of minor victim of sexual abuse by two-way closed-circuit television violated the Confrontation Clause where there was not a judicial finding that the victim's fear of the defendant was the dominant reason for her inability to testify in open court; therefore, the victim was legally absent from court. Because she was absent, the prosecution was also barred from using statements the victim made during a forensic interview.

2. United States v. Sdoulam, 398 F.3d 981 (8th Cir. 2005). Expert statistical testimony comparing nationwide estimated monthly average sales of pseudoephedrine at convenience stores with the estimate monthly average sales at defendant's convenience store was admissible where there was no testimony regarding the mathematical probability defendant was guilty of the crime charged.

3. United States v. Thomas, 398 F.3d 1058 (8th Cir. 2005). Evidence of defendant's two prior convictions for distribution of crack cocaine which took place in the same neighborhood, although involving smaller amounts and occurring over a period of ten years, was admissible to show defendant's intent in a case involving charges of possession with intent to distribute cocaine base.

4. United States v. Wipf (Gary), 397 F.3d 677 (8th Cir. 2005). Admission of testimony of psychologist concerning his interviews with child sex abuse victims did not violate Confrontation Clause where victims also testified at trial.

5. United States v. Kenyon, 397 F.3d 1071 (8th Cir. 2005). Evidence that one of minor victim's male caretakers had past sexual contact with his own stepdaughters and that victim may have had sexual activity with a local boy was excludable under Rule 412; exclusion did not violate defendant's constitutional rights.

6. United States v. Wipf (Arlie), 397 F.3d 632 (8th Cir. 2005). Evidence of blood alcohol level of .214 taken from defendant driver as part of his medical treatment following a fatal accident was relevant to show he was driving under the influence and while prejudicial (because it was strong evidence of the commission of involuntary manslaughter) it was not unfairly prejudicial because it would be used on a proper basis; the fact that evidence of a warrantless sample was suppressed did not affect the admissibility of the independently drawn sample, for which medical staff did not require probable cause.

7. United States v. Vieth, 397 F.3d 615 (8th Cir. 2005). In a case charging defendant with conspiracy to manufacture and distribute methamphetamine, prior bad acts evidence showing defendant's involvement in two other methamphetamine-related crimes (which were similar in nature and close in time and location) was admissible to show defendant's state of mind.

E. Right to Counsel

1. United States v. Gonzalez-Lopez, ___ F.3d ___, 2005 WL 525229 (8th Cir. 3/8/2005). District court's imposition of sanctions on out-of-state counsel on the ground he communicated with a represented party without first obtaining permission of counsel was contrary to Missouri's rule of professional conduct where the out-of-state attorney was not representing any other party in the case; counsel who represented the out-of-state attorney at the sanctions hearing similarly should not have been sanctioned.

2. United States v. Fox, 396 F.3d 1018 (8th Cir. 2005). *Sua sponte* assertion of the attorney-client privilege by the court on behalf of witness whose attorney was not present in court was not an abuse of the court's discretion nor violative of the Confrontation Clause.

F. Sufficient Evidence

1. United States v. Ausler, 395 F.3d 918 (8th Cir. 2005). Evidence of defendant's knowing or intentional possession of a distributable quantity of crack cocaine was not insufficient where crack cocaine was hidden within tape-wrapped bricks of powder cocaine found on the front passenger floor of the vehicle defendant was driving because package of crack made lumps on the outside of the bricks, which would support an inference defendant knew more than powder was in the packages.

2. United States v. Vesey, 395 F.3d 861 (8th Cir. 2005). Recording of a controlled buy indicating defendant sold an informant 12-13 units of crack cocaine was sufficient to establish knowing and intentional distribution of cocaine base, even though marked bills used to pay for base were never recovered nor was container in which defendant transported the drugs.

3. United States v. Coffey, 395 F.3d 856 (8th Cir. 2005). Even though defendant lived modestly and had financial difficulties, testimony from three drug dealers concerning purchase of large quantities of crack cocaine from defendant, which were already broken down into smaller units, was sufficient evidence from which a jury could infer conspiracy to distribute crack.

G. Sentencing

1. Shepard v. United States, ___ U.S. ___, 125 S. Ct. 1254 (2005). In determining whether a guilty plea to burglary under a nongeneric statute was generic for application of the Armed Career Criminal Act, the inquiry should be limited to the terms of the plea agreement or the plea colloquy, or a comparable judicial record. Evidence extraneous to these items should not be considered. However, where the generic character of prior pleas is disputed, the fact should be submitted to a jury pursuant to Apprendi.

2. Roper v. Simmons, ____ U.S. ____, 125 S. Ct. 1183 (2005). Death penalty cannot be imposed on offenders who were under the age of 18 when they committed the relevant crimes for which the penalty is sought.

3. United States v. Rojas-Coria, 401 F.3d 871 (8th Cir. 2005). Defendant's refusal to testify concerning information about transportation of drugs to and/or from California, which was outside of his information concerning three drug sales in which he was involved, justified disqualifying him from safety-valve relief.

4. United States v. Haidley, 400 F.3d 642 (8th Cir. 2005). Even where defendant was sentenced at the bottom of the federal sentencing guideline range, sentence under the mandatory scheme was not harmless error and resentencing under Booker was in order.

5. United States v. Sayre, 400 F.3d 599 (8th Cir. 2005). Whether defendant had preserved a Boooker sentencing error was held irrelevant in this case as the district court's upward departure from the mandatory guideline did not affect the ultimate sentence.

6. United States v. Cotton, 399 F.3d 913 (8th Cir. 2005). Written order requirement of 18 U.S.C. § 3553(c)(2) was not applicable to revocation of supervised release, which is based on non-binding policy statements.

7. United States v. Selwyn, 398 F.3d 1064 (8th Cir. 2005). Defendant objected to the court's drug quantity findings concerning personal use amounts, entitling him to resentencing in light of Booker.

8. United States v. Davis, 397 F.3d 672 (8th Cir. 2005). Where all of the information used to prosecute other individuals in a related case was obtained by the government before obtaining defendant's post-Miranda statement, defendant was not entitled to substantial assistance motion. Assuming defendant made a "substantial threshold showing" that the government's refusal was "not rationally related to a legitimate government interest," he was entitled to either discovery or an evidentiary hearing -- discovery was allowed and no further action was required.

9. United States v. Hart, 397 F.3d 643 (8th Cir. 2005). Where AUSA's "promise" to file a substantial cooperation motion was made after a plea had already been entered and where defendant's cooperation turned out to be merely a tip regarding the presence of a small quantity of heroin in a third party's house instead of the agreed "sting or buy/bust arrangement," court did not abuse discretion in refusing to compel the filing of a § 5K1.1 motion.

10. United States v. Killgo, 397 F.3d 628 (8th Cir. 2005). Although wire fraud and money laundering charges to which defendant pled guilty arose out of a single incident wherein defendant did not fulfill a lease for commercial aircraft, the district court properly considered other incidents of similar conduct involving other airlines in which defendant used the same types of documents, worked with the same accomplice and which occurred within months of each other as relevant conduct supporting a two-level increase.

11. United States v. Franklin, 397 F.3d 604 (8th Cir. 2005). Where the judge who revoked defendant's supervised release and sentenced him to serve the full term was the judge who imposed the initial sentence, the circuit found the judge considered the relevant factors; the court was not required to make specific findings on the factors considered in the revocation context.

12. United States v. Yahnke, 395 F.3d 823 (8th Cir. 2005). Use of defendant's prior second-degree murder conviction as a basis for upward departure, even though it was also considered in computing his criminal history score, was not unreasonable as district court found the seriousness of defendant's criminal history score was underrepresented.

13. United States v. Cole, 395 F.3d 929 (8th Cir. 2005). Federal sentence began to run the date defendant was returned to federal custody from state custody, not the date he was sentenced.

14. United States v. Peters, 394 F.3d 1103 (8th Cir. 2005). Defendant's failure to appear for a revocation hearing scheduled within a short time frame did not qualify as willful obstruction of justice, nor did defendant's failure to provide two UA's or to appear for a presentence investigation interview.

H. Habeas

1. Johnson v. United States, ___ U.S. ___, 125 S. Ct. 1571 (2005). The one-year limitations period of § 2255 begins to run when petitioner receives notice of the order vacating a prior conviction used to enhance a federal sentence, provided petitioner shows due diligence in seeking the order vacating the predicate conviction.

2. Rhines v. Weber, ____ U.S. ____, 125 S. Ct. 1528 (2005). A district court may exercise discretion to stay a mixed petition and allow a prisoner to present any unexhausted claims to the state court, if the court determines there was good cause for failure to exhaust the claims.

3. Brown v. Payton, ____ U.S. ____, 125 S. Ct. 1432 (2005). State court's application of federal case law concerning consideration of mitigation evidence to similar but not identical facts was not unreasonable even though case law addressed precrime mitigation evidence, not post-crime as involved here; therefore, Ninth Circuit went beyond the limits of federal habeas review set by AEDPA in holding the court's application of the law was unreasonable.

4. Taylor v. Norris, 397 F.3d 1060 (8th Cir. 2005). Arkansas Supreme Court's finding of procedural default of ineffective assistance of counsel claim because petitioner failed to "adequately abstract the record" as required by appellate rules was a ground adequate and independent of federal claims, preventing further federal habeas review.

5. Ferguson v. Roper, 400 F.3d 635 (8th Cir. 2005). The due process principles of Arizona v. Youngblood, 488 U.S. 51 (1988), did not apply where videotape evidence was not destroyed or lost until after trial.

6. Sera v. Norris, 400 F.3d 538 (8th Cir. 2005). Circumstantial evidence consisting of defendant's use of "date rape" drug on victims was sufficient to convict defendant of rape under Arkansas law.

7. Cox v. Burger, 398 F.3d 1025 (8th Cir. 2005). Petitioner's change in trial strategy on retrial did not change motive for examination of witness from first trial, who was unavailable to testify for second trial; therefore, admission of testimony from first trial did not violate the Confrontation Clause.

III. CIVIL RIGHTS

A. Procedure

1. City of Rancho Palos Verdes v. Abrams, ___ U.S. __, 125 S. Ct. 1453 (2005). Limitations on authority of state and local governments under the Telecommunications Act concerning regulation of location, etc. of wireless communications facilities could not be enforced through a § 1983 action.

2. Nebraska Beef, Ltd. v. Greening, 398 F.3d 1080 (8th Cir. 2005). Availability of Bivens remedy is an issue of law which may be considered on interlocutory appeal similar to qualified immunity issues; remedy was not available against USDA inspectors.

B. Fourth Amendment

1. Muehler v. Mena, _____ U.S. _____, 125 S. Ct. 1465 (2005). Two-three hour handcuff detention of occupant of premises for which law enforcement officials had a valid search warrant did not violate the Fourth Amendment, nor did questioning of the occupants about their immigration status.

2. McVay v. Sisters of Mercy Health Sys., 399 F.3d 904 (8th Cir. 2005). Even if officer had "tackled" plaintiff's decedent as he headed toward locked glass door, the force used was not excessive under the circumstances: decedent was disoriented and showing signs of lack of mental control and clearly posed a threat to himself.

3. Flynn v. Brown, 395 F.3d 842 (8th Cir. 2005). Because there was an otherwise thorough investigation of charges that plaintiff inflated loss from theft of cigarettes from his company's warehouse, a retiring detective's failure to review a videotape from a warehouse surveillance camera before plaintiff's arrest did not detract from the probable cause which existed to arrest plaintiff, even though he was ultimately acquitted.

C. Due Process

1. Jennings v. Wentzville R-IV School District, 397 F.3d 1118 (8th Cir. 2005). Where school district provided ongoing training to teachers concerning methods of investigating student misconduct, a single incident of a cheerleading advisor undertaking a late-night meeting with her squad about allegations some members had been drinking before a school event was not enough to give the district notice its training policy was inadequate.

D. Title IX

1. Jackson v. Birmingham Bd. of Educ., ___ U.S. ___, 125 S. Ct. 1497 (2005). Claim of discriminatory retaliation against a coach who complained girls' basketball was not receiving equal funding and access was covered by Title IX's private cause of action.

E. Qualified Immunity

1. Forrester v. Bass, 397 F.3d 1047 (8th Cir. 2005). Although Missouri child protection statutes gave DFS personnel duties regarding receipt of reports, investigation, and provision of protective/preventive services to child reported to be abused or neglected, those statutes did not create an entitlement subject to protection under the Fourteenth Amendment because they did not require specific substantive outcomes; therefore, no procedural due process violation occurred. With respect to substantive due process claims arising from deaths of two children who had been abused, although conduct of social worker in failing to verify whereabouts of the two children during a home visit might be negligent, it was not "egregious or outrageous" simply because she took "what she saw and ... heard at face value."

2. Terrell v. Larson, 396 F.3d 975 (8th Cir. 2005). Motorist was killed when her vehicle was struck by police officers who drove through a red light on their way to respond to a domestic disturbance call. Circuit holds "intent-to-harm standard of Lewis" applied to the officers' decision to "engage in high-speed driving" in response to an emergency not involving hot pursuit.

IV. LABOR AND EMPLOYMENT

A. Age Discrimination

1. Smith v. City of Jackson, MS, ___ U.S. ___, 125 S. Ct. 1536 (2005). A disparate-impact theory is authorized under the ADEA, however, in this case a valid claim was not made as the petitioner did not identify any specific test or practice within the contested pay plan which adversely impacted older workers.

2. Parisi v. Boeing Co., 400 F.3d 583 (8th Cir. 2005). Plaintiff's ninety-four subsequent application rejections were not "like or reasonably related" to the one failure-to-hire claim made in his original EEOC intake questionnaire and dismissal of those claims for failing to exhaust administrative remedies under ADEA was appropriate.

3. Stidham v. Minn. Mining & Mfg., Inc., 399 F.3d 935 (8th Cir. 2005). In RIF case, plaintiff's statistical evidence showing only a 4% decline in the work force over age 40 was insignificant and did not support an inference of discrimination; employer's definition of "redundant" positions (those whose duties could be eliminated or reassigned without negative impact on efficiency or service), although different from its ordinary meaning, was a term of art: plaintiff's newly created position fit within the employer's definition.

B. Disability Discrimination

1. Kratzer v. Rockwell Collins, Inc., 398 F.3d 1040 (8th Cir. 2005). Plaintiff was not qualified for new job in plant. Although she claimed the employer "impeded the interactive process" when it demanded she take a qualifying test without accommodation, the "breakdown in the interactive process" was attributable to her failure to provide an updated evaluation of the accommodations she required, not the employer's refusal to provide accommodations.

2. Strate v. Midwest Bankcentre, Inc., 398 F.3d 1011 (8th Cir. 2005). Desert Palace had no impact in summary judgment context and trial court properly focused on whether there was a genuine issue of fact concerning whether defendant bank was motivated by plaintiff's association with her disabled newborn child. Evidence showing a "close temporal proximity" between the birth of plaintiff's disabled child and the termination decision, that factor, in combination with plaintiff's lengthy and "stellar" employment history and qualifications for the new position for which she was told she was not a viable candidate, was sufficient to get by summary judgment.

C. Sex, Race, National Origin

1. Torlowei v. Target, 401 F.3d 933 (8th Cir. 2005). Plaintiff's claims that she was terminated on the basis of race had no support in the summary judgment record; cases cannot be decided "on the basis of fairness, not evidence of . . . discrimination."

2. LeGrand v. Area Resources, 394 F.3d 1098 (8th Cir. 2005). Harassing conduct of priest/boardmember of nonprofit organization toward male employee of organization, while "crass . . . churlish and . . . manifestly inappropriate," were three isolated incidents over a nine-month period of time, therefore were not so severe or pervasive as to create an actionable hostile work environment.

3. Okruhlik v. University of Arkansas, 395 F.3d 872 (8th Cir. 2005). Where plaintiff did not complete the tenure review process to its final administrative conclusion, the circuit found that she did not suffer adverse employment action for purposes of her gender discrimination complaint.

4. Pedroza v. Cintas Corp., 397 F.3d 1063 (8th Cir. 2005). Reviewing a case alleging same-sex harassment between female co-workers, the circuit rejects a dual standard analysis for male and female same-sex cases, particularly where the only evidence regarding "the prevalance of vulgar language and behavior in female dominated workplaces" was plaintiff's self-serving opinions.

5. Eliserio v. United Steelworkers Loc. 310, 398 F.3d 1071 (8th Cir. 2005). Evidence held sufficient to pass summary judgment in a racially hostile work environment case against a union included the union's purchase and distribution of "No Rat" stickers around the same time as racially derisive graffiti combining references to plaintiff, his Hispanic heritage and a rat appeared in the plant, coupled with an affidavit from a former employee that a board member said the stickers were targeted at plaintiff and the union steward said more than once they were trying to get rid of plaintiff.

D. Family Medical Leave Act/Equal Pay Act/Fair Labor Standards Act

1. Grey v. City of Oak Grove, 396 F.3d 1031 (8th Cir. 2005). Evidence in summary judgment record was not sufficient to create a genuine issue of material fact whether the reasons articulated for discharging plaintiff were a pretext for retaliating against him for bringing an action under the FLSA. Although only approximately four months passed between the time he settled the FLSA claim and the time he was discharged, it was seven months from the time his attorney wrote the City making the FLSA claim and time of discharge and nearly a year between the time plaintiff first filed for overtime compensation and the time he was discharged, time gaps which created doubt that retaliation occurred.

2. McBurney v. Stew Hansen's Dodge City, Inc., 398 F.3d 998 (8th Cir. 2005). Where plaintiff did not raise a claim to front pay until appeal, his FMLA action was correctly dismissed for failure to produce evidence of damages. Furthermore, a time delay of six months between plaintiff's return from FMLA leave and lateral transfer to another position was not evidence of a sufficient causal link between his request for leave and his transfer.

V. PRISONER RIGHTS

A. Procedure

1. Wilkinson v. Dotson, ___ U.S. ___, 125 S. Ct. 1242 (2005). Actions challenging the constitutionality of state parole procedures may be brought under a § 1983 action for equitable relief.

B. Due Process

1. Johnson v. California, ___ U.S. ___, 125 S. Ct. 1141 (2005). An unwritten prison policy which racially segregated new prisoners in double cells for up to 60 days was subject to strict scrutiny review in an equal protection challenge to the policy, not the deferential standard of Turner.